

No. PD-1034-20

TO THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF TEXAS

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4/28/2021  
DEANA WILLIAMSON, CLERK

TERRY MARTIN,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Lubbock County, Trial Cause 2019-494,736  
No. 07-19-00082-CR

\* \* \* \* \*

**STATE PROSECUTING ATTORNEY'S  
REPLY BRIEF**

\* \* \* \* \*

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This case involves Appellant's admitted membership in the Cossacks, an organization that (for purposes of the sufficiency challenge raised on appeal and granted review) is a criminal street gang. The only question is whether the offense of unlawful carrying of a weapon by a gang member also requires proof that the defendant is "one of the three or more" who actually engaged in crime or at least

associated in its commission.<sup>1</sup> Under Appellant’s interpretation, if an admitted Bloods or Crips member, dressed in gang colors, drives down a residential street with a gun in his car, even alongside known gang members, he has not committed the offense of gang-member UCW if the police have no evidence specifically connecting him to the gang’s crimes. Appellant insists this interpretation is necessary because, otherwise, law-abiding citizens will be swept up in the definition of gang-member UCW. He might have had a point—if the statute applied to people who were only tangentially connected to an organization of which they had no knowledge or opportunity to acquire knowledge, or, if the members of one group were also deemed to be members of a fringe group they never joined.<sup>2</sup> Under the State’s interpretation, however, the statute doesn’t reach this far. Ordinary, common understanding of

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<sup>1</sup> *Ex parte Flores* would have required only the latter. Appellant sometimes phrased his sufficiency complaint in terms of requiring the former, and the court of appeals said it agreed with his complaint. See *Martin v. State*, No. 07-19-00082-CR, 2020 WL 5790424, at \*4 (Tex. App.—Amarillo, Sept. 28, 2020). Since the court of appeals failed to consider Appellant’s association with the Cossacks—his membership, financial support, and one-time leadership role—as evidence of his association in the commission of the Cossack’s criminal activities, it may be that the court of appeals was requiring evidence of Appellant’s personal role in actually carrying out crimes.

<sup>2</sup> Appellant’s trial counsel would argue that this latter scenario is exactly what happened to Appellant. He argued to the jury that only the 1% of Cossacks are the criminal street gang. The State’s evidence was the opposite, and Appellant did not contest the sufficiency of the evidence to show that the Cossacks as a whole constitute a criminal street gang.

membership in a group requires joining, signing up, or doing something affirmative to be part of a whole, as well as acceptance of the new member by the rest of the group. Consequently, a potential member will typically have an opportunity to explore what the organization is about before joining and make a deliberate choice. If, as required by the statute, the organization continuously or regularly associates in the commission of criminal activities, it would be difficult, in the vast majority of instances, for a potential member to be unaware of that.

The State agrees that “member” has to be understood in context, despite Appellant’s assertions to the contrary.<sup>3</sup> And, of course, the requirement of membership must be “read together” (in *Ex parte Flores*’s words) with § 46.02(a-1)(2)(C)’s explicit reference to § 71.01’s definition of “criminal street gang.” The State’s criticism of the case is that “read[ing]” these statutes “together” does not authorize what *Ex parte Flores* did: collapsing two requirements into one and reading *out* of the statute a requirement of a criminal street gang. This error plagues Appellant’s interpretation, too, which he sees as just requiring three or more people committing crimes within a larger whole. The statute actually requires that the “three or more ...” constitute an entity, a united whole—namely, a criminal street gang.

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<sup>3</sup> See App. CCA Brief at 14.

Thus it isn't enough that a tiny subset of the organization associates in crime; implicit in the requirement of "a criminal street gang" is that it is this entity or whole that collectively has the required characteristics—including criminality. This is underscored by the definition's other requirements, which are themselves shared or unifying: "a common identifying sign or symbol" or "identifiable leadership."<sup>4</sup>

The State's interpretation does not require every single member to regularly associate in crime. But the criminal actions of the collective will be imputed to the members of that collective. And particularly given that there will almost always be an opportunity to explore the activities of the organization before someone decides on membership, there is nothing unfair about this. More to the constitutional question of overbreadth, the number of members who remain in ignorance of the collective criminal actions of the organizations to which they belong will pale in comparison to the substantial number of those that necessarily know the illicit nature of the Crips, Bloods, Aryan Brotherhood, Mexican Mafia, or the outlaw motorcycle gangs when they join up. Those who could not have known can raise and preserve an as-applied challenge or attack sufficiency of the evidence to establish their membership or that their group as a whole is a criminal street gang. Alternatively, a

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<sup>4</sup> TEX. PENAL CODE § 71.01(d).

future defendant could advocate that the culpable mental states of knowledge and recklessness extend all the way to the circumstance that makes a defendant's conduct illegal: the illicit nature of the criminal street gang.

**PRAYER FOR RELIEF**

The State of Texas prays that the Court of Criminal Appeals reverse the judgment of the court of appeals and affirm Appellant's conviction.

Respectfully submitted,

STACEY M. SOULE  
State Prosecuting Attorney

/s/ *Emily Johnson-Liu*  
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## **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 889 words.

/s/ *Emily Johnson-Liu*

Assistant State Prosecuting Attorney

## **CERTIFICATE OF SERVICE**

The undersigned certifies that on this 27th day of April 2021, the State Prosecuting Attorney's Brief on the Merits was served electronically on the parties below.

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